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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

THE DAVIS COMPANY, *Petitioner*,

v.

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL 282, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; AND WILLIE RUDD, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED FOR REVIEW

I. Does Section 7 of the Labor Management Relations Act, 29 U.S.C. § 157 (1976), and this Court's decision in *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), preempt the defamation law of Tennessee and immunize false and misleading statements posted on the employer's bulletin board by the union president where both the trial and appellate courts find that the posting of such statements violate the collective bargaining agreement between the union and the employer?

II. Do this Court's decisions in *Carbon Fuel Company* v. *United Mine Workers*, 444 U.S. 212 (1979) and *Complete Auto Transit* v. *Reis*, ___ U.S. ___, 101 S.Ct. 1836 (1981), require dismissal of a claim by an employer for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), where the breach of the contract is committed by the union president admittedly acting within the course and scope of his authority?

LIST OF PARTIES

Petitioner (hereinafter referred to as The Davis Company or the Company), is an employer engaged in interstate commerce in Memphis, Tennessee, and is a wholly owned division of National Bedding and Furniture Industries, Inc., of Memphis. National Bedding and Furniture Industries, Inc., also owns Serta Mattress Company and National Fibers Company of Memphis. The Davis Company's claims against United Furniture Workers of America AFL-CIO (the International) were dismissed by the trial judge, and the Davis Company's appeal of that dismissal was dismissed before the United States Court of Appeals for the Sixth Circuit, and thus the International is not a party in this proceeding. Local 282, United Furniture Workers of America, AFL-CIO, is a labor organization in Memphis, Tennessee, and Willie Rudd is its President.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. Certiorari Should Be Granted In Order To Refine The Scope Of Federal Preemption Of State Defamation Laws Where The Defamation Does Not Occur During Union Organizational Campaigns, And Where The Defamation Specifically Violates A Collective Bargaining Agreement Between The Parties	7
II. Certiorari Should Be Granted Because The United States Court Of Appeals For The Sixth Circuit Decided A Federal Question In Conflict With Applicable Decisions Of This Court And Federal Statutes By Exculpating A Union From Liability For Breach Of A Collective Bargaining Agreement When The Conduct Constituting The Breach Was Committed By The Union President Acting Within The Course And Scope Of His Authority	11
APPENDIX:	
A. Judgment of the United States Court of Appeals for The Sixth Circuit, March 31, 1982	1a
B. Judgment of the United States District Court for the Western District of Tennessee, June 3, 1980	3a
C. Findings of Fact and Conclusions of Law, United States District Court for the Western District of Tennessee, May 30, 1980	4a
D. Order Denying Motion for Rehearing, United States Court of Appeals for the Sixth Circuit, May 13, 1982	11a
E. 29 U.S.C. § 157 (1976); 29 U.S.C. § 185 (1976)	12a

TABLE OF AUTHORITIES

CASES CITED:	Page
Airco Speer Carbon-Graphics v. *Local No. 502*, 494 F. Supp. 872 (W.D. Pa. 1980)	15
Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238 (1962)	6, 11
Carbon Fuel Company v. *United Mine Workers*, 444 U.S. 292 (1979)	5, 12, 14
Complete Auto Transit v. *Reis*, ___ U.S. ___, 101 S.Ct. 1836 (1981)	5, 12, 14
Handley v. *May*, 588 S.W.2d 772 (Tenn. App. 1979)	10
Letter Carriers v. *Austin*, 418 U.S. 264 (1974)	4, *passim*
Linn v. *Plant Guard Workers*, 383 U.S. 53 (1966)	6, 7, 8, 9, 10
Memphis Publishing Co. v. *Nichols*, 569 S.W.2d 412 (Tenn. 1978)	10
New York Times Company v. *Sullivan*, 376 U.S. 259 (1964)	7
N.L.R.B. v. *Brewery & Beer Distributor Drivers*, 281 F.2d 319 (3rd Cir. 1963)	15
N.L.R.B. v. *International Brotherhood of Boilermakers*, 321 F.2d 807 (8th Cir. 1963)	15
N.L.R.B. v. *Local No. 135*, 267 F.2d 870 (7th Cir. 1958)	15
The Davis Co. v. *U.F.W.A.*, 674 F.2d 557 (6th Cir. 1982)	13

STATUTES CITED:	Page
29 U.S.C. § 157	5
29 U.S.C. § 185	4, *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. ____

THE DAVIS COMPANY, *Petitioner*,

v.

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL 282, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO AND WILLIE RUDD, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The judgment of the United States District Court for the Western District of Tennessee, entered on June 3, 1980, is printed in Appendix B hereto. The findings of fact and conclusions of law of the United States District Court for the Western District of Tennessee (unreported), entered on May 30, 1980, is printed in Appendix C. The opinion of the United States Court of Appeals for the Sixth Circuit, dated March 31, 1982, is reported at 674 F.2d 557.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 31, 1982. The Davis Company filed a timely petition for rehearing, with

suggestion for rehearing en banc. The petition was denied by order dated May 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are no constitutional provisions involved. The statutes involved are 29 U.S.C. § 185 and 29 U.S.C. § 157, which are printed verbatim in Appendix E.

STATEMENT OF THE CASE

On September 6, 1977, The Davis Company entered into a collective bargaining agreement with Local 282 of the United Furniture Workers of America, AFL-CIO (the Union), concerning wages, hours, and conditions of employment at The Davis Company in Memphis. In Article X of that agreement, the Company agreed to provide an in-plant bulletin board for use by the Union in giving notice of union activities. In consideration of the Company's agreement to provide a bulletin board, the Union agreed as follows in Article X, Section 4:

> "The Union agrees that it will not publish or circulate any false or misleading remarks about the employer, its products, its officers, and other personnel."

The collective bargaining agreement provided for a grievance procedure, but there was no provision for binding arbitration, and there was not a no-strike clause. The collective bargaining agreement did provide, however, that the Union would observe a five day "cooling off" period after the unsuccessful resolution of a grievance before engaging in a strike.

On June 27, 1978, a number of employees filed a grievance claiming that they were entitled to additional overtime pay. The parties followed the grievance procedure

during which the Company discovered that certain employees had not been paid on a daily overtime basis as required in the collective bargaining agreement, and by mid-July, 1978, the Company had voluntarily disbursed checks to all affected employees for the additional pay.

The Union, however, at the insistence of its president, Willie Rudd, continued the grievance and claimed that they were entitled to double payment of overtime hours. The trial court found, and the appellate court agreed, that Mr. Rudd's contention was spurious and directly contrary to a provision in the collective bargaining agreement which prohibited the pyramiding of overtime. Additional grievance meetings pursuant to the grievance procedure were held between the Company and the Union on July 20 and August 2, 1978, during which the Company made known its position concerning no pyramiding of overtime. During the grievance procedure, Willie Rudd was among those present representing the Union.

After the August 2 meeting, Rudd drafted and caused to be distributed and posted on the bulletin board provided by the Company pursuant to Article X of the collective bargaining agreement a "Special Bulletin" which stated that The Davis Company has "*cheated* the employees out of *thousands of dollars* on overtime pay." [Emphasis in the original.]

During the evening of August 2, the Union held a meeting during which no strike was authorized, encouraged or even discussed. However, both union stewards who were at the meeting testified at trial that they felt they had been cheated, and testified that those at the meeting expressed their feelings that they believed they had been cheated by the Company. The next day, August 3, 1978, a number of key employees walked out of the plant, and among the employees who did walk out were

those who held critical jobs such that the plant was forced to cease production. All union stewards who were working at the time joined in the walkout. Limited production resumed August 7, but full production did not resume until August 9. The damages proven by the Company as a result of the walkout were never disputed in the trial court or on appeal.

The Company argued and the district court and appellate court both found that the "Special Bulletin" which was drafted by Willie Rudd, and posted and disbursed at Mr. Rudd's directions, was false, was misleading, and constituted a breach of the collective bargaining agreement on the part of the Union. The trial court had jurisdiction of the claim under 29 U.S.C. § 185(a). Because it was uncontested that Mr. Rudd was acting within the course and scope of his authority as Union president when he caused the bulletin to be posted, the district court held the Union liable for the breach of the collective agreement pursuant to 29 U.S.C. §§ 185(b) & (e).

The district court also found that the bulletin contained a deliberate falsity accusing the company of dishonesty, and that therefore the bulletin was defamatory under Tennessee law. Applying the standards of *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974), the trial court found that the libel was committed with malice, and therefore that both Mr. Rudd and the Union were jointly liable for defamation. The court had jurisdiction over this claim pursuant to pendent jurisdiction.

The district court found, and the appellate court agreed, that the August 3 walkout did not result from any claim on the part of the Union to exercise any lawful right to strike, walk out, or protest. The district court found, and the appellate court agreed, that the sole, direct and proximate cause of the walkout was the false, misleading

and inflammatory statements of Mr. Rudd that the company had cheated the employees out of thousands of dollars.

However, the appellate court reversed the district court on both the breach of collective bargaining agreement and defamation claims. Although recognizing its obligations to affirm findings of fact of the trial court unless clearly erroneous, the Court of Appeals nevertheless reversed the district court's finding that the defamation was published with malice. The Court of Appeals erroneously weighed the evidence and found that the publication was not actionable under *Letter Carriers* v. *Austin*, *supra*. The Court of Appeals thus held that the libel laws of Tennessee were preempted by Section 7 of the Labor Management Relations Act (the Act), 29 U.S.C. § 157, under which recovery is prohibited in the absence of proof of malice.

The Court of Appeals, however, agreed with the district court that the posting of the "Special Bulletin" constituted a breach of the collective bargaining agreement and that the walkout and consequent loss of production were proximately caused by the breach. Despite affirmance of those specific findings, the Court of Appeals employed the *non sequitur* that the loss of production, and thus the damages, incurred by the company resulted from the failure of the employees to remain on their jobs, and not from the act of posting the "Special Bulletin." Even though this case did not involve a cause of action for breach of a no-strike agreement, the Sixth Circuit apparently relied on this Court's precedents in *Complete Auto Transit* v. *Reis*, ___ U.S. ___, 101 S.Ct. 1836 (1981), and *Carbon Fuel Company* v. *United Mine Workers*, 444 U.S. 212 (1979), to hold that the Union could not be liable for breach of a collective bargaining agreement

in the absence of a showing that it had either authorized, participated in, or ratified the strike.

The judgment of the district court was therefore reversed and remanded with orders to dismiss the Company's complaint.

REASONS FOR GRANTING THE WRIT

The treatment of the Company's defamation claim by the Sixth Circuit involves an important question of federal law which has not been settled by this Court. In *Letter Carriers* v. *Austin*, *supra*, the Court declined to prescribe the limitations of *Linn's* preeemption of state defamation laws by the policies of federal labor law. Both *Linn* and *Letter Carriers* involved preemption in the setting of a union organizational drive, where robust speech is expected and condoned under federal labor law. The defamation in this case, however, occurred between parties to a collective bargaining agreement which specifically prohibited the language employed by Mr. Rudd. This case therefore presents a conflict of competing policies of federal labor law: free speech versus insuring the integrity of collective bargaining agreements.

The Sixth Circuit's dismissal of the Section 301 action for breach of the collective bargaining agreement conflicts with Section 301(b) & (e) of the Act and this Court's decision in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962). The posting of the "Special Bulletin" by Mr. Rudd was a breach of the collective bargaining agreement, and Mr. Rudd was admittedly acting within the scope of his authority as the Union's president and agent. Yet the Sixth Circuit absolved the Union from liability because of the alleged lack of proof that the Union authorized the walkout which resulted from the breach of the contract. This ruling results in a serious erosion of the

accountability of both unions and employers for the acts of its agents.

I.

Certiorari Should Be Granted In Order To Refine The Scope Of Federal Preemption Of State Defamation Laws Where The Defamation Does Not Occur During Union Organizational Campaigns, And Where The Defamation Specifically Violates A Collective Bargaining Agreement Between The Parties.

In *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), the Court expressed concern about the possible deleterious effects of state defamation law on national labor policy. In *Linn*, a union official published defamatory remarks concerning an official of the employer during an organizational campaign. The union accused the official of "robbing" the employees of pay increases, and of "lying" to them. *See* 383 U.S. at 56. Relying heavily on the need of both the employer and the union to have some leeway in making statements about each other during union organizational attempts, this Court decided to protect defamatory statements made during organizational campaigns with the standards of "malice" first adopted by the Court in dealing with suits against newspapers. *See New York Times Company* v. *Sullivan*, 376 U.S. 259 (1964). The Supreme Court in *Linn* thus held that the National Labor Relations Act preempted state defamation law and would prevent recovery by the plaintiff for defamatory publications made during a union organizational drive unless the plaintiff proved malice and resulting injury. "Malice" was defined as a publication of defamatory remarks with either knowledge of its falsity or reckless disregard as to its truth. *See* 383 U.S. at 61.

In *Old Dominion Branch No. 496, National Association of Letter Carriers (Letter Carriers)* v. *Austin*, 418 U.S. 264 (1974), this Court again examined its pre-

emption doctrine first announced in *Linn* in the context of a continuing union organizational drive. In *Letter Carriers*, a non-union employee sued a union for publishing a newsletter containing derogatory comments about him. The Court reaffirmed the requirement of *Linn* that the plaintiff show malice and injury.

In *Letter Carriers*, the plaintiff attempted to avoid the requirements of *Linn* by arguing that no "labor dispute" within the meaning of *Linn* was presented by the facts of the case. The Court thus limited its opinion in *Letter Carriers* as to the reach of *Linn's* preemption requirements by stating:

> "It is true, as appellees point out, that there was no dispute between labor and management involved here, and that the union's organizing effects were neither during the course of a representation election campaign nor directed toward achieving recognition. But whether *Linn's* partial preemption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a 'labor dispute'; rather, *application of Linn must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.*"

See 418 U.S. 279-80 [emphasis supplied].

The facts before this Court, however, do not involve those policies of the federal labor law leading to the protection for freedom of speech. To the contrary, the federal interest involved in this case is the protection of the integrity of collective bargaining agreements. As the Sixth Circuit itself pointed out, the Union's promise to refrain froim posting false or misleading statements on the bulletin board was a *quid pro quo* for the offer of the employer to provide an in-plant bulletin board. The re-

striction on the use of the bulletin board by the Union was narrow and reasonable, and the Union was bound by it. The reasoning behind this agreement between the Company and Union was apparent by the actual result in this matter. The Company wanted to avoid work disruptions which could result from inflammatory language on the bulletin board, and thus gave the Union access to a bulletin board only in return for the Union's promise to prevent disruption by refraining from posting inflammatory material. The fears of the Company were realized in this case when false and misleading material posted in violation of the collective bargaining agreement led to a walkout by the employees.

Having entered into an agreement to refrain from posting false and misleading statements, the Union should not be allowed to rely on the preemptive effects of *Linn* by arguing that the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated. This case did not involve those narrow situations, such as organizational drives, which have been protected from state defamation laws because of the necessity for freedom of speech and "rough and tumble" language. Therefore, the Sixth Circuit erred in holding that *Linn's* partial preemption of state libel remedies barred recovery in this case. The Petitioner asserts that this Court in its decisions in *Linn* and *Letter Carriers* did not intend to absolve parties to a collective bargaining agreement from their responsibilities and liabilities under a collective bargaining agreement.

At the time that *Linn* was decided, many states, including Tennessee, would allow recovery for defamation even in the absence of proof of actual damages, and without proof of any fault on the behalf of the defendant. The concern for large jury verdicts against unions was ob-

vious in this Court's decision in both *Linn* and *Letter Carriers*. The Petitioner would point out to the Court that the Tennessee courts have ruled that a plaintiff may recover for defamation only upon proof of actual damages, and proof of at least negligence on behalf of the defendant. *Memphis Publishing Co.* v. *Nichols*, 569 S.W.2d 412, 418 (Tenn. 1978); *Handley* v. *May*, 588 S.W.2d 772, 776 (Tenn. App. 1979).

Although the petitioner asserts error in the standards used by the Sixth Circuit, the Petitioner would argue that the requirements of *Linn* and *Letter Carriers* were met in this case in any event. The trial court specifically relied on the standards of *Letter Carriers*, and found that the defamation was uttered with malice in that Mr. Rudd's bulletin contained a deliberate falsity. That finding of fact, based on the trial court's observation of the demeanor of Mr. Rudd as a witness, should have been affirmed unless clearly erroneous. The Sixth Circuit, however, felt obligated to conduct an independent examination of the record because the case involved defamation under the federal labor laws. The Sixth Circuit's reliance on *Letter Carriers*, however, was erroneous. In *Letter Carriers*, this Court did decide, as a matter of law, that the word "scab" could not be libelous because the plaintiff was in fact a scab, and thus the accusation was true. In the instant case, however, the Sixth Circuit attempted to disturb a finding of fact which relied on the state of mind of Mr. Rudd, and whether he published the false statements with knowledge of their falsity, or reckless disregard as to their truth. The trial judge, who observed the demeanor of Mr. Rudd as a witness, should and did make that determination, and the Sixth Circuit did not have the authority to reverse that finding of fact as a matter of law.

II.

Certiorari Should Be Granted Because The United States Court Of Appeals For The Sixth Circuit Decided A Federal Question In Conflict With Applicable Decisions Of This Court And Federal Statutes By Exculpating A Union From Liability For Breach Of A Collective Bargaining Agreement When The Conduct Constituting The Breach Was Committed By The Union President Acting Within The Course And Scope Of His Authority.

The trial court found, and the appellate court agreed, that a breach of the collective bargaining agreement occurred when Mr. Rudd caused to be posted a bulletin which accused the company of cheating its employees, thus constituting "false or misleading" statements prohibited by Article X, Section 4 of the collective bargaining agreement. Any relief against Mr. Rudd individually for breach of the collective bargaining agreement was barred by this Court's decision in *Atkinson* v. *Sinclair Refining Company*, 370 U.S. 238 (1962), which holds that Section 301(b) of the Act, 29 U.S.C. § 185(b), prohibits a judgment against any individual member of the union for breach of a collective bargaining agreement. However, it was never disputed that Mr. Rudd was acting within the course and scope of his duties as President of Local 282 when he caused the bulletin to be posted. The trial court correctly relied on Sections 301(b) and (e) of the Act, 29 U.S.C. §§ 185(b) and (e), which hold that both labor organizations and employers are bound by the acts of their agents, and that the acts of a union's agent need not be actually authorized or subsequently ratified to hold that the union is liable for the breach of the collective bargaining agreement, and is responsible for the damages occasioned by that breach. At no time in this case was it disputed that Mr. Rudd was acting as an agent of the Union when he committed the breach of the collective bargaining agreement.

The Sixth Circuit, however, did not apply Sections 301(b) and (e) when it exculpated the Union from liability for breach of the collective bargaining agreement. The Sixth Circuit agreed that the posting of the "Special Bulletin" was a breach of the collective bargaining agreement, and that this breach caused a walkout by the employees, leading to the employer's damages. The Sixth Circuit, however, concluded that the Union could not be held liable for damages resulting from the walkout in the absence of a showing that it had either authorized, participated in, or ratified the "strike." In so holding, the Sixth Circuit relied on case precedents involving employer suits under Section 301(a) for breach of a no-strike clause in the collective bargaining agreement. In this case, however, the walkout by the employees did not constitute a breach of the collective bargaining agreement, because there was not a no-strike clause in the contract. In the instant case, the breach of the collective bargaining agreement occurred at the posting and the distribution of the bulletin; and the walkout, as found by both the trial and appellate court, was proximately caused by that breach, and constituted the damages proximately flowing from the breach.

In reaching its conclusion, the Sixth Circuit relied on this Court's decisions in *Complete Auto Transit* v. *Reis*, ___ U.S. ____, 101 S.Ct. 1836 (1981), and *Carbon Fuel Company* v. *United Mine Workers*, 444 U.S. 212 (1979). Both cases, however, are inapposite. *Complete Auto Transit* involved the question whether an employer may maintain a suit for damages against individual defendants acting not in behalf of the union but in their personal and non-union capacity where their unauthorized individual action violated the no-strike provision of the collective bargaining agreement. *Carbon Fuel Company* addressed the issue of the liability of an international union

for damages occasioned by a local union's breach of a no-strike clause. Neither of these cases involved the situation where an employer seeks a monetary recovery against a union because of the acts of the union president while acting within the course and scope of his authority.

The Davis Company cannot reconcile the holding of the Sixth Circuit that the walkout did result from the posting of the "Special Bulletin" containing language which breached a provision of the collective bargaining agreement, and the court's later conclusion that the damages resulted from the failure of the employees to remain on their jobs, not from the act of posting the "Special Bulletin." *See* 674 F.2d at 564, 565.

The absolution of the union for damages to the employer occasioned by the conduct of its president constituting a breach of the collective bargaining agreement undermines the liability of both employers and labor organizations for the acts of their agents, which liability is required in Section 301 of the Act. As this Court explained in *Atkinson* v. *Sinclair Refining Company*, *supra*, Congress intended familiar principles of the law of agency to apply in Section 301 suits, including the principle that proof of actual authorization or ratification of the agent's act by his principal is not required. *See also Carbon Fuel Company*, *supra*, at 464, n. 6. Congress mandated by Section 301(b) and Section 301(e) that neither employers nor labor organizations could escape liability for the acts of their agents acting within the course and scope of their authority, even though the specific act was not actually authorized or subsequently ratified.

The Petitioner would have no quarrel with the decision of the Sixth Circuit if the basis of its claim had been the breach of a no-strike clause by wildcat strikers acting without the authority of either their local union or the

international union. Such situations would in fact be controlled by this Court's principles enunciated in *Complete Auto Transit* and *Carbon Fuel*. However, the instant case involves the breach of the collective bargaining agreement by the Union president acting within the scope of his authority. The result of the decision of the Sixth Circuit is to relieve the Union for the responsibility of its president's acts. The Petitioner believes that such a decision will impact strongly on the liability of both employers and labor organizations where either the employer or the labor organization seeks to escape the financial consequences of the acts of its agents. The Sixth Circuit agreed with the district court's finding that the walkout was proximately caused by the bulletin. As Judge Weick pointed out in his dissent, substantial evidence supported the district court's finding that the walkout and damage sustained by the employer resulted from the breach of the collective bargaining agreement, and that the Union enjoys no exemption from liability.

In Sections 301(b) and (e) of the Act, Congress intended to insure the integrity of collective bargaining agreements by requiring that both employers and labor organizations be responsible for the acts of their agents. This mandate surely includes the acts of union and company presidents. In the instant case, the Union, through its president acting within the scope of his authority, has breached a collective bargaining agreement, resulting in proven damage to the employer, and yet the Union has escaped liability for that breach. The Petitioner therefore urges that certiorari be granted to consider the result in this case in light of Sections 301(b) and (e) of the Act.

Finally, the petitioner would point out that it was established without contradiction or cross-examination at trial that the union stewards participated in the walkout.

It is well established that stewards act as agents of a labor organization, as do foremen act as agents of the employer, under Sections 301(b) and (e) of the Act. Acts of the steward can constitute evidence of union participation in unlawful conduct. *See N.L.R.B.* v. *Brewery & Beer Distributor Drivers*, 281 F.2d 319, 321-322 (3d Cir. 1960); *N.L.R.B.* v. *International Brotherhood of Boilermakers*, 321 F.2d 807, 810 (8th Cir. 1963); *N.L.R.B.* v. *Local No. 135*, 267 F.2d 870, 872 (7th Cir. 1959); *Airco Speer Carbon-Graphite* v. *Local No. 502*, 494 F.Supp. 872 (W.D. Pa. 1980). Therefore, even if the Sixth Circuit were correct in holding that the Union cannot be responsible for damages absent evidence of union participation in the walkout, substantial evidence of such participation exists in this case by the fact that the union stewards joined in the walkout.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 80-1477

THE DAVIS, COMPANY,
Plaintiff-Appellee,

vs.

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL 282, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; and WILLIE RUDD,
Defendants-Appellants.

Filed Mar. 31, 1982

Before: EDWARDS, Chief Judge; WEICK and LIVELY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed with directions to dismiss the action.

It is further ordered that Defendants-Appellants recover from Plaintiff-Appellee the costs on appeal, as itemized below,

and that execution therefore issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk
JOHN P. HEHMAN
A True Copy
Attest:
/s/ Audrey Crochett
AUDREY CROCHETT
Deputy Clerk

Issued as Mandate: May 24, 1982

COSTS: To Be Recovered By Appellant

Filing fee	$
Printing	$281.12
Total	$281.12

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action File No. 78-2396

THE DAVIS, COMPANY,

VS.

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO:
LOCAL NO. 282, UNITED FURNITURE WORKERS
OF AMERICA, AFL-CIO AND WILLIE RUDD

JUDGMENT

This action came on for trial before the Court, Honorable Robert M. McRae, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is entered against the defendants United Furniture Workers of America, AFL-CIO, Local No. 282, and Willie Rudd and in favor of the plaintiff, The Davis Company, in the amount of $7,416.95 plus costs.

Filed: June 3, 1980

APPROVED:

/s/ Robert M. McRae, Jr., Judge,
ROBERT M. MCRAE, JR.,
United States District Court

Dated at Memphis this 3rd day of June, 1982

/s/ J. Franklin Reid
J. FRANKLIN REID
Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 78-2396-M

THE DAVIS, COMPANY,

Plaintiff,

v

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL NO. 282; UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; and WILLIE RUDD,

Defendants.

Filed: May 30 12:40 PM '80

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard by the Court without a jury. The following findings of fact and conclusions of law constitute the ruling of the Court in this cause.

FINDINGS OF FACT

1. Defendant Local is the duly certified collective bargaining agent for the production employees at plaintiff, The Davis Company.

2. On September 6, 1977, plaintiff and defendant Local entered into a collective bargaining agreement governing the wages, hours, and other terms and conditions of employment at The Davis Company. (See Trial Exhibit No. 1). Said collective bargaining agreement was in full force and effect during the events involved in this suit.

3. Article VI of the collective bargaining agreement is entitled "Hours of Work and Overtime Pay," and it provides as follows:

> An employee will be paid 1-1/2 times over eight (8) hours any day worked, provided (a) they are scheduled to work five (5) or more days in the work week *and* (b) that employee works all scheduled hours during their work week. There shall be no pyramiding of overtime.

Article X, Section 4 provides:

> The Employer shall provide the Union with a bulletin board in the plant which the Union and its members shall have the right to use for the purpose of giving notice of Union activities, such as meetings, special events and other similar matters. The Union agrees that it will not publish or circulate any false or misleading remarks about the Employer, its products, its officers, and other personnel.

5. Article III provides for a four-step grievance procedure to handle grievances between the company and its employees. There is no provision for binding arbitration.

6. Article III, Section 1(d) provides as a fourth step of the grievance proceedings that there will be a meeting between representatives of the Union and Employer, who will conduct a full hearing from all persons who know the facts. The last sentence in Section 1(d) provides as follows:

> If no such settlement is arrived at within five (5) days after the meeting, then the Union may strike, and the Employer may lock out the employees.

However, the parties never got to the end of the five-day period after a meeting such as the one called for in the fourth step of the grievance procedure.

7. On or about June 27, 1979, certain employees, acting through the union, filed a grievance with the company alleging that the company had not been paying overtime in compliance with Article VI of the collective bargaining agreement. At "step two" of the grievance proceeding, the company discovered that it had erred in paying employees overtime based

on hours worked in excess of 40 hours a week, as opposed to overtime computed on a daily basis as required by the collective bargaining agreement. The company took immediate action to reimburse all affected employees, and it issued checks in the middle of July to all employees entitled to back pay.

8. The union, however, refused to settle the grievance. The union claimed that the employees were entitled to double payment on overtime based on the following spurious theory: if an employee works four 10-hour days and one 8-hour day, for a total of 48 hours, he should be paid daily overtime for all hours in excess of 8, or 8 hours for the week and, the union claimed, the employees should receive *in addition*, 8 hours overtime for the 8-hour day, for a total of 16 hours overtime for the week. The union's claim was made in spite of the clear prohibition against the pyramiding of overtime in the collective bargaining agreement.

9. On August 2, 1978, the union, acting through its President, Willie Rudd, caused to be posted on the plant's bulletin board (which bulletin board was provided to the union pursuant to Article X. Section 4 of the collective bargaining agreement) a "Special Bulletin" which was addressed to the employees. (See Trial Exhibit No. 5.) The bulletin was written by Mr. Rudd. The bulletin accused The Davis Company of "cheating" the employees out of "thousands of dollars" of overtime. The bulletin also said that a union meeting would be held that night to discuss what course of action the union would take. The bulletin was distributed among the employees as well.

10. On the night of August 2, 1978, there was a union meeting. According to the testimony of two union stewards, employees at the meeting expressed the feeling that they had been cheated. However, the stewards and Willie Rudd testified that there was no discussion of walking out during the August 2 meeting. In fact, the employees discussed a lawsuit as opposed to going on strike. No strike vote was taken.

11. According to the testimony of Mr. Carl Scarborough, the President of the International Union, all strikes by locals

must be approved by the International. The International received no request for strike authority, and it gave none.

12. About 2 P.M. on the afternoon of August 3, 1978, many employees walked off their jobs and left the plant. Because these employees held key production positions, the whole plant had to be shut down for the remainder of the day.

13. The plant was able to achieve no production or reduced production on August 3, 4, 7, and 8.

14. According to the testimony of The Davis Company's certified public accountant, the fixed cost of operations for The Davis Company was $1,002,473.90 during the fiscal year in question. Based upon a 365-day calendar year, the fixed cost per calendar day equals $2,746.50.

15. The testimony of the custodian of the plaintiff's production records reveals that there was no production on August 4. On august 3, 7, and 8, 1978, there was $64,845.00 in production, whereas normal production on those days would be a total of $125,062.86. Actual production during those three days was 51.8% of the normal production. Consequently the amount of fixed costs not recouped for August 3, 7, and 8 (48.15% times total fixed costs for those three days) would equal $3,967.32, based on a 365-day calendar year. Adding in the lost fixed-costs for August 4, the total damages for lost production as calculated by the fixed cost of operation will total $6,713.82 based on a 365-day calendar year.

16. The Davis Company was required to retain private security guards as a result of the walkout at a cost of $703.13.

17. The plant resumed full production on August 9, 1978.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the local union in this cause based on a breach of the collective bargaining agreement, pursuant to § 301 of the National Labor Relations Act. 29 U.S.C. § 185(a). This Court has pendant jurisdiction over the local union and Rudd individually in the state defamation

claims because the state and federal claims derive from a common nucleus of operative facts. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1966).

2. The posting of the bulletin of August 2, 1978, which accused the plaintiff of cheating its employees out of thousands of dollars, constituted a breach of Article X, § 4 of the collective bargaining agreement which forbids the publication or circulation by the union of any false or misleading remarks about the employer or any of its officers.

3. At all times relevant to this suit Willie Rudd was acting president of the local, and as the local's agent acting within the course of his employment the union is responsible for his acts. *See* 29 U.S.C. § 185(b)(e).

4. The accusation that The Davis Company "cheated" employees was false and misleading and was also defamatory in that it falsely accused the company of dishonesty. Furthermore, there was clearly no basis for the interpreation assertd by Mr. Rudd of the overtime provision of the contract, Article VI, Section 1. The falsity contained in the notice posted on the bulletin board by Rudd was deliberate, and therefore actionable. *Letter Carriers* v. *Austin*, 418 U.S. 264, 283 (1974). Because Mr. Rudd was acting as the president of the local, the local is liable for his defamatory statements, and both Mr. Rudd and the local are jointly liable on the defamation cause of action.

5. False, misleading, and defamatory remarks are not protected under the First Amendment or the National Labor relations Act. *Tempte, Inc.* v. *NLRB*, 590 F.2d 871 (10th Cir. 1979); *Bettcher Manufacturing Corporation*, 76 NLRB 526 (1948); *Maryland Dry Dock Company* v. *NLRB*, 183 F.2d (4th Cir. 1950).

6. The walkout by the employees and the resulting loss of production by the plaintiff was proximately caused by Mr. Rudd's false, misleading and defamatory statements posted on the bulletin board.

7. When a company suffers a loss of production as a result of a breach of contract or other wrongful acts, the company is entitled to damages measured by the loss of fixed costs of operation which are not offset by income otherwise derived or attributable to productive labor. *Sheet Metal Workers International Association* v. *Atlas Sheet Metal Company*, 384 F.2d 101, 109 (9th Cir. 1967). Based on the testimony of the company's certified public accountant and the custodian of the production records, that amount in damages equals $6,713.82. The plaintiff is also entitled to the costs of obtaining private security service in the amount of $703.13 for total compensatory damages in the amountof $7,416.95.

8. Punitive damages are recoverable under 29 U.S.C. § 185 to deter future intentional breaches of collective bargaining agreements which disturb industrial peace. *Wanzer & Sons, Inc.* v. *Milk Drivers Union*, 249 F.Supp. 664 (N.D. Ill. 1966). However, this Court finds that the conduct of Mr. Rudd lacks that degree of recklessness required for an award of punitive damages for the breach of the collective bargaining agreement or under Tennessee defamation law.

During final argument counsel for the defendants made arguments by which the defendants claim the union had a right to walk out or strike, and therefore this Court may not award damages for lost production resulting from the walkout. The defendants argued:

(1) The walkout was permitted pursuant to the grievance procedure, and

(2) The walkout was a protected activity pursuant to the National Labor Relations Act.

Neither of these contentions is supportable under the proof of the case.

IT IS THEREFORE ORDERED that the Clerk shall enter a judgment against the defendants United Furniture Workers of America, AFL-CIO, Local No. 282, and Willie Rudd and in

favor of the plaintiff, the Davis Company, in the amount of $7,416.95 plus costs.

Enter: this 30th day of May 1980.

/s/ Robert M. McRae, Jr., Judge
ROBERT M. MCRAE, JR.,
U.S. District Court

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-1477

THE DAVIS, COMPANY,
Plaintiff-Appellee

v

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL 282, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; AND WILLIE RUDD,
Defendants-Appellants

ORDER

Filed: May 13 1982

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and WEICK, Senior Circuit Judge.

No judge in regular active service on the court having requested en banc consideration of the petition for rehearing filed herein by the plaintiff-appellee, the petition has been referred to the hearing panel. Upon consideration of the petition for rehearing the court concludes that the issues raised therein were fully considered upon the submission and decision of the appeal and that rehearing is not required.

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX E

29 U.S.C. § 157. Rights of Employees

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent—Entity for purposes of suit—Enforcement of money judgments. Any labor organization which represents employees in any industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organizations as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For thepurposes of actions andproceedings by or against labor organizations in the district courts of the

United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

FILED
SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-62

In The

Supreme Court of the United States

October Term, 1981

THE DAVIS COMPANY,
Petitioner,

v.

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; LOCAL 282, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO; AND WILLIE RUSH,
Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

B. J. Wade
(Counsel of Record)

Mark Allen
[illegible]
[illegible]
[illegible]
Counsel for Respondents

INDEX

	Page
Opinions Below	1
Relevant Constitutional Provisions And Statutes	2
Reasons Why The Writ Should Be Denied	2
1. This Court's decision in Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) and Old Dominion Branch No. 496, National Association of Letter Carriers (Letter Carriers) v. Austin 418 U.S. 264 (1974) clearly holds that suits for defamation of the state law arising out of a labor dispute are not actionable absence a showing of actual malice with respect to publication and damages flowing therefrom.	2
2. Neither the decision below nor the record raises the second question presented in the petition.	5
Conclusion	7
Appendix A - Opinion and Judgment of the Court of Appeals for the Sixth Circuit	A-1
Appendix B - Complaint	A-19
Appendix C - First Amendment to the United States Constitution 29 U.S.C. §157, §158(c) and §185	A-23

TABLE OF AUTHORITIES

Cases:

Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) . 6

Carbon Fuel Co. v. United Mine Workers, 44 U.S. 212 (1979) 6

Complete Auto Transit v. Reis, ____ U.S. ____ 101 Sup. Ct. 1836 (1981)..... 6

Linn v. United Plant Guard Workers, 383 U. S. 53 (1966) 2

Motorcoach Employees v. Missouri, 374 U.S. 74 (1963). 4

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) .. 3

Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) .. 2

Statutes:

29 U.S.C. §158(c)..... 2

29 U.S.C. §185 2,6

No. 82-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE DAVIS COMPANY,
Petitioner,

v.

UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO;
LOCAL 282, UNITED FURNITURE WORKERS OF AMERICA,
ALF-CIO; AND WILLIE RUDD,
Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

This matter is before the Court on the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit requesting review of the opinion of the United States Court of Appeals for the Sixth Circuit, dated March 31, 1982, reported at 674 F.2d 577. The Sixth Circuit opinion reversed the findings of fact and conclusions of law of the United States District Court for the Western District of Tennessee, entered on May 30, 1980.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

This matter involves the First Amendment to the United States Constitution, 29 U.S.C. §157, §158(c), and §185, which are printed verbatim in Appendix C.

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Court's Decision In *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966) And *Old Dominion Branch No. 496, National Association Of Letter Carriers (Letter Carriers)* v. *Austin*, 418 U.S. 264 (1974) Clearly Holds That Suits For Defamation Under State Law Arising Out Of A Labor Dispute Are Not Actionable Absent A Showing Of Actual Malice With Respect To Publication And Damages Flowing Therefrom.

The first question presented in the petition (p.i) is whether this court's decision in *Linn* v. *United Plant Guard Workers, supra,* pre-empts the defamation law in Tennessee and:

> Immuniz[ies] false and misleading statements posted on the employer's bulletin board by the union president where both the trial and appellate courts find that the posting of such statements violate the collective bargaining agreement between the union and the employer?

Initially, it must be recognized that the decision in *Linn, supra,* only partially immunized state law actions for defamation arising out of labor disputes. *Linn* arose out of an organizing campaign wherein it was alleged that the respondent union had caused to be circulated certain leaflets which allegedly defamed an assistant general manager of the employer. *Linn,* 383 U.S. at 56. Mr. Justice Clark, writing for the majority, reasoned that the enactment of §8(c) of the Labor Management Relations Act "manifests a congretional intent to encourage free debate on issues dividing labor and management." *Linn,* 383 U.S. at 62. Mr. Justice Clark then noted that the court's

holding in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) required cases involving speech to be considered against the commitment to the principle that debate should be "uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks." *Id.* Therefore, Mr. Justice Clark therefore concluded that since federal labor policy encouraged free debate that policy required that the most replusive speech involved in labor disputes enjoyed immunity as long as it fell short of a deliberate or reckless untruth. *Linn*, 383 U.S. at 63. Specifically, the court limited the availability of state remedies for liable to those incidences in which the complainant could show that the defamatory statements were circulated with malice and caused him damage.

Petitioner correctly quotes the language from *Letter Carriers, supra*, which sets forth the test in *Linn* as whether the defamatory publication is made in a context where the policies of federal labor law leading to the protection of freedom of speech are significantly implicated. However, petitioner seeks to limit the holdings of *Linn* and *Letter Carriers* to their facts. Respondent contends that the holding of *Letter Carriers* and *Linn* are not as narrow as the petitioner urges.

Whether or not *Linn* turned on the definition of a labor dispute (petition at p. 8) it is clear that there was a dispute between labor and management in this case. In fact, the dispute was at a stage where either lockout on the part of the employer or strike on the part of the union was imminent. (See Appendix A at p. 9). The language of *Linn* speaks to the issue of labor disputes:

> Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions.
>
> *Linn*, 383 U.S. at 58.

The court relied on the policy of federal labor law to determine whether *New York Times* applied. *Linn* clearly speaks in terms of labor disputes rather than organizational activity. See *Linn*, 383 U.S. at 62.

Petitioner argues the broad principle stated in *Letter Carriers* on one hand (petition at p. 8) and then limits *Linn* and *Letter Carriers* to their facts. (Petition at p. 9). Clearly, there is no language in *Linn* or *Letter Carriers* which expressly limits their holdings to pre and post recognition organizational activity. Were this true, the test cited by petitioner could not be worded in such broad terms.

Moreover, petitioner seeks to couch the Sixth Circuit's opinion in terms of a conflict of pre-emption of state law by federal labor law and a competing interest in the integrity of the collective bargaining agreement. (Petition at p. 9). This comparison is misplaced. The Sixth Circuit held that the *bulletin* violated the collective bargaining agreement since the employer interpretation of the contract was correct. (Appendix A at p.10). Then, it held that the defamation action must meet the *Linn, Letter Carriers* and *New York Times* test. Assuming *arguendo,* the court had held that there was actionable defamation, the court made it clear that there was no proof in the record of any damages flowing therefrom. Clearly, any work stoppage was covered as a protective activity in the absence of a "no strike" provision. *Motorcoach Employees* v. *Missouri,* 374 U.S. 74 (1963). There can be no damages flowing from a lawful strike. At most, the employer would be entitled to nominal damages since the District Court found no malice warranting punitive damages. In addition, petitioner points out that Tennessee courts require that a plaintiff may recover for defamation only on proof of actual damage. Petitioner has no actual damage flowing from the alleged defamatory statement since there was an absence of a "no strike" provision in the collective bargaining agreement and the petitioner only alleged damages as a result of the strike. (App. B, p.2, ¶5).

Petitioner asserts, inter alia, that the requirements of *Linn* and *Letter Carriers* were met. (Petition at p. 10). Petitioner questions the Sixth Circuit's independent examination of the record. Clearly, this argument is untenable since the Sixth Circuit was required by the strict language of *Letter Carriers* to conduct an independent examination. *Letter Carriers* states:

> This, however, cannot be the end of our inquiry. The court has often recognized that in cases involving free expression we have the obligation, not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under Federal law . . . we must make an independent examination of the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. [Citations omitted]. *Letter Carriers,* 418 U.S. at 282.

The court, based on the evidence in the record, concluded that actual malice was not proven and could not be reasonably inferred. Clearly, the court's ruling was that there was no material evidence to support the judgment. The case must be overturned where there is no evidence in the record to support the finding.

The employer contends that the purpose of the restrictions on the bulletin board use were to avoid language which would lead to work disruptions. However, assuming arguendo, this is true, for such a work disruption to be actionable as a direct result of such lanaguage, in the absence of a no strike provision the employer must prove that the strike or work stoppage was not otherwise authorized by the collective bargaining agreement. As the Sixth Circuit stated, there were already grounds which could justify action on either side. (See Appendix A at p. 12).

2. Neither The Decision Below Nor The Record Raises The Second Question Presented In The Petition.

The second question presented in the petition is whether this court's decision in *Carbon Fuel Co.* v. *United Mineworkers,* 444 U.S. 212 (1979) and *Complete Auto Transit* v. *Reis,* ____ U.S. ____, 101 Sup.Ct. 1836 (1981) required dismissal of the employer's claim for breach of contract under 29 U.S.C. §185 where the breach of contract is committed by the union president admittedly acting within the course and scope of his authority. The petitioner admits, as it must, that Mr. Rudd cannot be individually held liable for breach of the collective bargaining agreement by virtue of this court's decision in *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238 (1962). However, agency as stated in §§301(b) and (e) of the Act, 29 U.S.C. §§185(b) and (e) are entirely irrelevant to the court's holding below. The Sixth Circuit expressly held that since the agreement did not contain a general "no strike" clause, there was no basis for finding that the walk-out constituted a breach of contract.

The petitioner's only basis for alleging damages as a result of a breach of contract was that the statement posted by Rudd on the bulletin board caused the employees to walk off their jobs thereby causing the plaintiff substantial monetary damages. (See Complaint at p. 2, ¶5). The Sixth Circuit noted that the issue which precipitated the labor dispute had gone through three steps of the contractual grievance procedure, that step four of the grievance procedure had been waived by mutual agreement, and that the employer's plant manager admitted that the employees were free to strike after the failure to settle the third stage of the grievance proceedings. The court reasoned that since the agreement did not contain a general "no strike" clause, there could be no breach of contract for the walk-out. Therefore, even though there was found a breach of contract by the posting of the notice on the bulletin board, petitioner had not proven damages resulting from the posting. Petitioner could only prove losses resulting from the strike which was by the petitioner's own admissions not illegal under the collective bargaining agreement. (Appendix A at p. 12).

Although the court made mention that *Carbon Fuel, supra,* and *Complete Auto Transit, supra,* would apply in the absence of a legal strike, clearly this language was dictum since the court had already found that there was no breach of contract regarding the walk-out as alleged in ¶5 of the complaint. As noted by the Sixth Circuit (Appendix A at p. 13) the cause of the strike was irrelevant after the failure of the third step of the grievance procedure and the waiver of the fourth step. At this point the union had a legal right to strike. Whether or not Mr. Rudd was an agent of the union or not is totally irrelevant to the case since the Sixth Circuit held that there was no breach of contract by the walk-out.

It is notable that petitioner did not allege below as it currently does not in its petition allege any damages other than that caused by the strike. Similarly, whether the union stewards participated in the work stoppage is irrelevant since the union had the right to strike and even if it had authorized a strike, there could be no breach of contract as a result of a strike.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

No. 80-1477
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Davis Company,

Plaintiff-Appellee,

v.

United Furniture Workers of America, AFL-CIO; Local 282, United Furniture Workers of America, AFL-CIO; and Willie Rudd,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Tennessee.

Decided and Filed March 31, 1982.

Before: Edwards, Chief Judge; WEICK* and LIVELY, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court in which EDWARDS, Chief Judge, joined. WEICK, Circuit Judge, (pp. 15-18) filed a separate dissenting opinion.

LIVELY, Circuit Judge. In this action, brought pursuant to § 301 of the Labor Management Relations Act of 1947 as amended (the Act), 29 U.S.C. § 185 (1976), an employer sought damages

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* Circuit Judge Weick retired from regular active service under the provisions of 28 U.S.C. § 371(b) on December 31, 1981, and became a Senior Circuit Judge.

from a union and a union official for breach of a collective bargaining agreement. The employer also claimed damages for defamation, asserting pendent state jurisdiction. Following a bench trial, the district court entered judgment for the plaintiff on both claims.

I.

The plaintiff, The Davis Company (the employer), a Tennessee corporation, entered into a three-year collective bargaining agreement with the United Furniture Workers of America, AFL-CIO, Local No. 282 (the union) on September 6, 1977. The agreement covered employees at the Memphis facilities of Davis. The defendant Willie Rudd signed the agreement on behalf of Local 282. He was president of Local 282 and a representative of the international union at all times pertinent to this case. Pursuant to the collective bargaining agreement (the agreement), on June 27, 1978 a group of Davis employees filed a grievance in which they claimed they had not been fully paid for overtime work. Article VI of the agreement provided for overtime as follows:

> An employee will be paid 1½ times over eight (8) hours in any day worked, provided (a) they are scheduled to work five (5) or more days in the work week *and* [italics in contract] (b) that employee works all scheduled hours during their work week. There shall be no pyramiding of overtime.

During the second stage of a four-step grievance procedure (which did not provide for arbitration) the employer determined that it had not been paying some employees for overtime work in accordance with Article VI. It was calculating overtime on a weekly rather than a daily basis. The affected employees were promptly reimbursed in accordance with the employer's revised understanding of the agreement. However, the union refused to settle the grievance on this basis and carried the grievance to the

third stage where no settlement was reached. Both sides then agreed to waive the fourth step of the grievance procedure, which provided:

> If no satisfactory settlement is arrived at within fifteen (15) days between the parties referred to in "c," the matter shall be taken up between a representative of the Union and a representative of the Employer. The parties will meet with each other within seven (7) days of a written request by either party to each other for such a meeting, and shall attempt to arrive at a settlement with a full hearing from all persons who know of the facts involved, both by the Union and the Employer. If no such settlement is arrived at within five (5) days after the meeting, then the Union may strike, and the Employer may lock out the employees.

On August 2, 1978 the defendant Rudd, as president of Local 282, posted a "Special Bulletin" on a bulletin board furnished by the employer pursuant to Article X, section 4 of the agreement, which provided:

> The employer shall provide the Union with a bulletin board in the plant which the Union and its members shall have the right to use for the purpose of giving notice of Union activities, such as meetings, special events and other similar matters. The Union agrees that it will not publish or circulate any false or misleading remarks about the Employer, its products, its officers, and other personnel.

The August 2d bulletin, which is reproduced as an appendix to this opinion, called a meeting of all employees for 7:30 p.m. that day to discuss problems at the plant, particularly overtime pay. The bulletin stated, "Based on our interpretation of the contract, we believe this Company has *cheated* the employees out of *thousands of dollars* on overtime pay." (Emphasis on original bulletin).

At the employees' meeting on the evening of August 2d there were complaints about overtime pay and talk of *filing* a lawsuit against the employer. Two union stewards testified that they, as well as other employees, felt that they had been cheated. However, there was no talk about a strike, no strike vote was taken and there was no authorization for a strike by the international union (a requirement of the union constitution). Nevertheless, in the early afternoon of August 3d many Davis employees walked off their jobs. The plant was shut down for the remainder of the day and operated on a limited basis between August 4th and 8th. Full production was resumed on August 9th.

II.

A.

The employer filed its complaint in the district court on August 11, 1978. It alleged that the statement in the special bulletin which accused The Davis Company of cheating its employees out of thousands of dollars violated the provision of Article X, section 4 of the agreement in which the union agreed not to "publish or circulate any false or misleading remarks about the Employer . . . ." It further alleged that the walkout of employees resulted from the false and misleading statement that the employer had cheated the employees and that the employer suffered damages from the loss of production during the walkout. The second count of the complaint charged that the publication "was willful and malicious and . . . was known by the Defendants to be untrue at the time of the statement . . . ." Special and punitive damages were sought for alleged defamation.

The local union and Rudd filed a joint answer admitting that Rudd acted as agent of Local 282 in posting the special bulletin and denying that the statements in the bulletin were false and misleading or willful and malicious. The defendants denied that

the agreement had been breached or the employer defamed. The answer also contained a number of affirmative defenses: that the statements in the bulletin were privileged under the First Amendment as expressions of opinion and fair comment; that the statements related to matters of public interest; that jurisdiction over the dispute was pre-empted under the Act and that the strike complained of was a "protected activity" within § 7 of the Act. By amendment these defendants added the defense that the employer had failed to exhaust the grievance procedures set forth in Article III of the agreement. The international union filed a separate answer dening its involvement in the activities complained of by the employer. The international union also filed a motion for summary judgment. The district court eventually dismissed the international union as a defendant.

B.

The district court entered a pretrial order which recited the issues as set forth in the pleadings and noted one additional defense, that the walkout was not proximately caused by the special bulletin. The order contained a stipulation that the employer "does not owe employees money for overtime pay."

In its findings of fact the district court held that the union's refusal to settle the grievance because it claimed the employees were entitled to double overtime was based on a "specious theory." Rudd had testified that he interpreted the overtime provision of the agreement as follows: if an employee scheduled to work five days in a given week worked 10 hours each of the first four days and 8 hours the fifth day, the employee was entitled to overtime pay for 16 hours, that is for two hours each of the first four days and for eight hours the fifth day. His justification for this interpretation was that federal law requires the payment of overtime for all work over 40 hours per week and that this was required in addition to the daily overtime covered by the agreement. He clung to this interpretation despite the fact that the employee in the example worked a total

of only 48 hours during the week and the agreement provided there would be no "pyramiding of overtime." Rudd's testimony indicated that he understood "pyramiding" to refer to the payment of double overtime for hours worked in excess of eight hours per day. Rudd was an experienced negotiator. He had participated actively in the negotiations which resulted in the September 6, 1977 agreement. Rudd testified that he honestly believed his interpretation of the overtime provision was correct at the time he posted the bulletin and only learned it was incorrect after suit was filed.

Among its conclusions of law the district court held that publication of the special bulletin constituted a breach of Article X, section 4 of the agreement; that Local 282 was responsible for the action of Rudd, its agent; that the accusation of cheating against the employer was false, misleading and defamatory because it accused the employer of dishonesty and "there was clearly no basis for the interpretation asserted by Mr. Rudd of the overtime provision of the contract, Article VI, section 1." The court further concluded that false, misleading and defamatory statements are not protected under either the First Amendment or the National Labor Relations Act. Though also labeled a conclusion of law the court made a finding that the loss of production which it found the employer had suffered was proximately caused by Rudd's "false, misleading and defamatory statements posted on the bulletin board." A judgment was entered awarding damages of $7,416.95 jointly against Local 282 and Rudd.

III.

We do not believe the decision in this case can properly turn on the defamation law of Tennessee as urged by the employer. The language about which the employer complains was published in the setting of a dispute concerning overtime pay of employees and, thus, was uttered "in a context where the policies of the federal labor laws leading to protection for freedom of speech

are significantly implicated." *Letter Carriers* v. *Austin*, 418 U.S. 264, 279 (1974). This being so, we look to federal law to determine whether recovery is permitted. Section 7 of the Labor Management Relations Act, 29 U.S.C. § 157 (1976),[1] guarantees the right of employees to freedom of speech in commenting on matters affecting their employment. However, the protection of the Act is forfeited by one who circulates a false statement with malice, that is with knowledge or its falsity or with reckless disregard for whether it is true of false. *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966). There can be no recovery for defamation uttered or published in the setting of a labor dispute in the absence of malice. In a libel case involving a public figure to whom the same requirement of malice applied the Supreme Court described this requirement as follows:

> There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. *Thompson*, 390 U.S. 727, 731 (1968).

Federal law encourages vigorous debate and permits intemperate and abusive language during organization campaigns and other labor disputes. In fact, it has been stated that the "most repulsive" speech enjoys immunity if it does not meet the

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[1] Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

test of actual malice. *Letter Carriers* v. *Austin, supra,* 418 U.S. at 284 quoting *Linn* v. *Plant Guard Workers, supra,* 383 U.S. at 63. Moreover, expressions of opinion, though false, and couched in very strong language, are not to be treated as falisifications of facts. *Id.* Likewise, the use of hyperbole which would not be treated by a hearer or reader as intended to be literally believed is not actionable. *Id.* This court has held highly offensive language protected by § 7 of the Act, where it is clearly used in a rhetorical rather than a literal sense. In *N.L.R.B.* v. *Container Corp. of America,* 649 F.2d 1213 (6th Cir. 1981) (per curiam), a bulletin posted by a union vice-president accused the employer of treating employees in a disgraceful manner, referred to the general manager as a "slave driver" and referred to the employees as his "chain gang." And the publication involved in *Great Lakes Steel, Div. of National Steel Corp.* v. *N.L.R.B.,* 625 F.2d 131 (6th Cir. 1980) (order), referred to the employer's policy of providing ambulance service for an isolated plant as "murder for profit." Both publications were held entitled to the protection of § 7.

The district court did not find specifically that Rudd entertained serious doubts as to the truth of his claim that the employer was cheating employees with respect to overtime payments. The court found as a fact only that this claim was based on a "specious theory," and that there was no basis for Rudd's interpretation of the agreement. Neither of these findings necessarily connotes knowing falsity. In one of its conclusions of law the district court held that the accusation of cheating was false and that the falsity was "deliberate" and therefore actionable. In a separate conclusion of law the district court held that "the conduct of Mr. Rudd lacks that degree of recklessness required for an award of punitive damages . . . ." Though these findings and conclusions are confusing and arguably inconsistent, we will not remand for a clarification. When defamation is claimed in cases under the federal labor laws a reviewing court should make an independent examina-

tion of the entire record to determine whether the speech or publication complained of is actionable. *Letter Carriers* v. *Austin, supra,* 418 U.S. at 282.

On the basis of our examination of the entire record, this court concludes that the district court erred in permitting recovery for defamation on the basis of the statements contained in the special bulletin. Though Rudd's interpretation of the contract proved untenable, there was no showing that the bulletin was published with actual knowledge of its falsity or in reckless disregard for its truth. Employees of the Davis Company who were members of Rudd's union had just exposed an error by the employer in its payment for overtime work. This revelation had occurred as a result of the employees' resorting to the grievance procedures contained in the agreement. The employer had been consistently misinterpreting the overtime provision in a way which deprived the employees of payments due them. The overtime language was either subject to more than one interpretation, or the employer had deliberately underpaid the employees. In this setting the union made its claim that the employer's second interpretation of Article VI was no more accurate than its first, and that the employees were still being underpaid. This dispute was very much alive when the bulletin was posted. A third-stage grievance meeting had ended in disagreement and the parties had agreed to waive the fourth step. Under these circumstances we do not believe the use of "cheated" in the special bulletin was actionable. The libel laws of Tennessee were preempted by federal labor law under which recovery is prohibited in the absence of actual malice. *Letter Carriers* v. *Austin, supra; Linn* v. *Plant Guard Workers, supra.* We conclude that actual malice was not proven and could not reasonably be inferred from this record. The finding of liability for defamation is reversed.

IV.

A.

The district court found that the posting of the special bulletin constituted a breach of the agreement and that the walkout and consequent loss of production were proximately caused by the breach. The defendants do not contend that the limitation on use of the bulletin board contained in Article X, section 4, unlawfully deprived them of their § 7 right to disseminate union literature on the employer's premises. *See N.L.R.B.* v. *Arrow Molded Plastics, Inc.*, 653 F.2d 280, 283-84 (6th Cir. 1981). Indeed, such an argument, if made, would not be tenable. The restriction on use of the bulletin board was narrow — the board would not be used to publish or circulate false or misleading remarks about the employer, its products, its officers or other personnel. This appears to be a reasonable limitation on the exercise of § 7 rights, a limitation related to considerations of maintaining production and discipline. *Cf. Larand Leisurelics, Inc.* v. *N.L.R.B.*, 523 F.2d 814, 818-19 (6th Cir. 1975). False and misleading statements about an employer, posted on its premises by a union, would be expected to have adverse effects on discipline and production. Furthermore, the limitation was included in the section of the collective bargaining agreement which provided a bulletin board for exclusive use of the union. Thus a *quid pro quo* was given by the employer: an exclusive union bulletin board in exchange for an agreement that it would not be misused. The limitation was reasonable and the union was bound by it.

B.

The next question is whether the provision of the agreement was violated by posting the special bulletin. The district court found the statement that the employer had cheated the employees to be false. There is substantial evidence to support this finding. In the pretrial order it was stipulated that the employer owed nothing to the employees for overtime pay. This

being so, the employer had not cheated the employees by refusing to pay the double overtime which Rudd claimed was owed. Here, in contrast with our consideration of the defamation claim, we are not concerned with Rudd's actual knowledge of the falsity of the claim. He had a false statement, based on an extremely tenuous construction of the agreement language, a construction which he testified he later found to be wrong. We believe Article X, section 4, required him to engage in a more penetrating analysis of the overtime language before, not after, he had caused the special bulletin to be posted. The statement in the bulletin was misleading as well as false. The employees were misled by it to continue demanding additional overtime pay to which they were not entitled, as is now admitted. The agreement was breached by Rudd's causing the special bulletin to be posted and the answer admitted that Rudd was acting as the union's agent in posting the bulletin.

C.

The district court also found that the walkout was proximately caused by the false and misleading matter in the special bulletin. The evidence on the cause of the walkout is sparse and certainly does not compel the finding which the district court made. However, no other explanation of the walkout was presented by any of the parties. It came immediately on the heels of the breakdown of the grievance proceedings, the posting of the bulletin and the meeting of which the bulletin gave notice. The question of overtime pay was the central theme of each of these events. It was apparently the principal matter discussed at the employees' meeting. Though no strike vote was sought or taken, it was reasonable for the district court to infer from all these circumstances that the August 3d walkout did result from the posting of the special bulletin containing language which breached a provision of the collective bargaining agreement. This inference was supported by evidence of a communication to the employer from the business agent of the union which stated that the walkout was over the grievance on overtime. The finding of causation was not clearly erroneous.

D.

The union and Rudd contend this action should have been dismissed for failure of the employer to exhaust contractual remedies. Our examination of the entire agreement fails to disclose any remedies which the employer was required to exhaust before commencing this action. Article III, section 1 of the agreement, relied upon by the defendants, has no application to the dispute which resulted in this lawsuit.

V.

The employer does not seek to recover from Rudd individually. It could not do so because § 301(b) forbids recovery from union members or officers for breach of a collective bargaining agreement. *Complete Auto Transit* v. *Reis*, ____ U.S. ____, 101 S. Ct. 1836 (1981). The remaining question is whether the union was subject to a judgment for damages on the basis of its activities as disclosed by this record.

The employer argues that the strike was unlawful under the contract because the union failed to observe the five-day cooling off period prescribed in step four of the grievance procedure. *ante* p. 3. However, the only evidence was to the effect that this step was waived by mutual agreement. In fact, the Davis plant manager stated as a witness that the employees were free to strike after the failure to settle during the third stage of grievance proceedings. The agreement did not contain a general "no strike" clause. Thus, there was no basis for finding that the walkout constituted a breach of contract. Even if it had been an illegal strike, however, the union could not be held liable in the absence of a showing that it had either authorized, participated in or ratified the strike. *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 216 (1979); *Complete Auto Transit* v. *Reis, supra*, ____ U.S. at ____, 101 S.Ct. at 1844; *Southern Ohio Coal Co.* v. *United Mine Workeres*, 551 F.2d 695 (6th Cir.), *cert. denied*, 434 U.S. 876 (1977); *North American Coal*

Corp. v. *Local 2262, U.M.W.A.*, 497 F.2d 459 (6th Cir. 1974); *cf. United Steelworkers of America* v. *Lorain*, 616 F.2d 919, 921 (6th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S. Ct. 2313 (1981) (applying § 6 of the Norris-LaGuardia Act). The evidence was clear that the walkout was neither authorized nor ratified.

The employer also argues that damages were awarded for defamation and breach of contract, not for conducting a strike; that the walkout caused a loss of production which was determined to be the proper measure of damages for the wrongful acts of Rudd and the union in posting the special bulletin. This is faulty reasoning. The damages resulted from failure of the employees to remain on their jobs, not from the act of posting the special bulletin. The posting of the bulletin may have been the catalyst which precipitated the walkout. However, the cause of the strike is irrelevant. In the absence of a showing that the union authorized or ratified the walkout, the damages which it caused may not be recovered from the union. The employer made no attempt to show any damages which flowed directly from the falsehood contained in the bulletin. In the absence of such showing, it was not entitled to recover in this § 301 action for breach of contract.

The judgment of the district court is reversed with directions to dismiss the action. The defendants-appellants will recover costs on appeal.

APPENDIX

SPECIAL BULLETIN

TO: All Davis Company Employees
FROM: Willie Rudd, President UFWA Local 282

There will be a very important and *urgent* meeting tonight, August 2, 1978, 7:30 p.m. at 2881 Lamar Avenue to discuss problems at your plant, *particular* your *overtime pay*.

Based upon our interpretation of the contract, we believe this Company has *cheated* the employees out of *thousands of dollars* on overtime pay.

It is important that each employee be present for this meeting. We will discuss and decide what course of action we will take to solve this problem.

8/2/78

WEICK, Senior Circuit Judge, dissenting: I respectfully dissent. In my opinion, neither the Labor Management Act, 29 U.S.C. § 185 or the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, or any other federal law to my knowledge, gives to the labor union a license to intentionally injure the employer by circulating defamatory or insulting material about him known to be false. *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966). The district court had pendant jurisdiction under *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966), to apply Tennessee tort law on defamation.

The controversy in this case did not arise out of campaign oratory of union employees and the employer in a Labor Board conducted election. It arose out of deliberate intentional acts of a local labor union designed to injure the employer by false defamatory material.

The district court adopted findings of fact and conclusions of law which are plain and understandable, although some of them were mixed.

The district court found:

> The union, however, refused to settle the grievance. The union claimed that the employees were entitled to double overtime based on the following *spurious* theory: if an employee works four 10-hour days and one 8-hour day, for a total of 48 hours, he should be paid daily overtime for all

hours in excess of 8, or 8 hours for the week and, the union claimed, the employee should receive *in addition,* 8 hours overtime for the 8-hour day, for a total of 16 hours overtime for the week. The union's claim was made in spite of the clear prohibition against the pyramiding of overtime in the collective bargaining agreement. (emphasis added).

. . .

2. The posting of the bulletin of August 2, 1978, which accused the plaintiff of cheating its employees out of thousands of dollars, constituted a breach of Article X, § 4 of the collective bargaining agreement which forbids the publication or circulation by the union of any false or misleading remarks about the employer or any of its officers.

3. At all times relevant to this suit Willie Rudd was acting president of the local, and as the local's agent acting within the course of his employment the union is responsible for his acts. *See* 29 U.S.C. § 185(b)(e).

4. The accusation that The Davis Company "cheated" employees was false and misleading and was also defamatory in that it falsely accused the company of dishonesty. Furthermore, there was clearly no basis for the interpretation asserted by Mr. Rudd of the overtime provision of the contract, Article VI, Section 1. The falsity contained in the notice posted on the bulletin board by Rudd was deliberate, and therefore actionable. *Letter Carriers* v. *Austen,* 418 U.S. 264, 283 (1974). Because Mr. Rudd was acting as the president of the local, the local is liable for his defamatory statements, and both Mr. Rudd and the local are jointly liable on the defamation cause of action.

5. False, misleading, and defamatory remarks are not protected under the First Amendment or the National Labor Relations Act. *Tempte, Inc.* v. *NLRB,* 590 F. 2d 871 (10th

Cir. 1979); *Bettcher Manufacturing Corporation*, 76 NLRB 526 (1948); *Maryland Drydock Company* v. *NLRB*, 183 F.2d 538 (4th Cir. 1950).

6. The walkout by the employees and the resulting loss of production by the plaintiff was proximately caused by Mr. Rudd's false, misleading and defamatory statements posted on the bullein board.

7. When a company suffers a loss of production as a result of a breach of contract or other wrongful acts, the company is entitled to damages measured by the loss of fixed costs of operation which are not offset by income otherwise derived or attributable to productive labor. *Sheet Metal Workers International Association* v. *Atlas Sheet Metal Company*, 384 F. 2d 101, 109 (9th Cir. 1967). Based on the testimony of the company's certified public accountant and the custodian of the production records, that amount in damages equals $6,713.82. The plaintiff is also entitled to the costs of obtaining private security service in the amount of $703.13 for total compensatory damages in the amount of $7,416.95.

The Union at no time either in the district court or here disputed the accuracy of the computation of the damage award.

The Collective Bargaining Agreement did not provide for arbitration so that the employer had no remedy except an action for damages.

In Black's Law Dictionary, Fifth Edition, the author defines the verb cheat:

To deceive and defraud. It necessarily implies a fraudulent intent. The words "cheat and defraud" usually mean to induce a person to part with the possession of property by reason of intentionally false representations relied and acted upon by such person to his harm. They include not

> only the crime of false pretenses, but also all civil frauds, and include all tricks, devices, artifices, or deceptions used to deprive another of property or other right. See Fraud.

Without question, the Union accused the company of criminal activity.

It is submitted that the district judge in trying this case without a jury had the right to and did make credibility assessments. He certainly did not believe the testimony of the Union President Rudd, whose theory as to double payment of overtime he found was "spurious". Rudd accused the company of dishonesty when he actually knew that the company did not intentionally withhold any money knowing it to be owing to its employes. If this does not involve malice, what is it?

In making his findings, the district judge could take into account inferences from proven facts logically deductible therefrom. He found that the walkout and damage sustained by the employer resulted proximately from the libelous statements asserted by the union on the bulletin board, which also violated the Collective Bargaining Agreement.

One other matter is noteworthy. The Collective Bargaining Agreement provided in Article III Section 4(d):

> If no such settlement is arrived at within five (5) days after [the last meeting under the grievance procedure], then the Union may strike and the Employer may lock out the employees. App. p. 145.

The purpose of the five day period after the last meeting was to provide for a cooling off time before the Union can strike. The Union in its brief erroneously calls the walkout a strike, which it was not. The last meeting was on June 2, and the employees met at night after the meeting. No strike was authorized at the meeting. The walkout occurred on the following day, June 3. If it was a strike which the Union claims it was, then it was an unlawful strike in violation of the Collective Bargaining Agreement, for which it was liable in damages.

In my opinion, the libelous statements were not authorized by the First Amendment to the Constitution, nor did they constitute "protected activity" under § 7 of the Act.

In my opinion, the findings of fact and conclusions of law adopted by the District Judge McRae were supported by substantial evidence and are not clearly erroneous. The majority takes the position that there was no evidence to support them, but this in my opinion is incorrect. This is a clear case of liability from which the Union and its President have no exemption.

I would affirm the judgment of the district court.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 78-2396

The Davis Company,

Plaintiff,

vs.

United Furniture Workers of America, AFL-CIO; Local No. 282, United Furniture Workers of America, AFL-CIO; and Willie Rudd,

Defendants.

COMPLAINT

Comes the Plaintiff, a Tennessee corporation with its principal place of business in Memphis, Shelby County, Tennessee, and sues the Defendants United Furniture Workers of America, AFL-CIO; Local No. 282, United Furniture Workers of America, AFL-CIO; and Willie Rudd. The United Furniture Workers of America, AFL-CIO, is an international labor union, hereinafter referred to as the "International"; and Local No. 282, International Furniture Workers of America, AFL-CIO, hereinafter referred to as the "Local" operates under the auspices of the aforesaid International Labor Union. Both said unions are organizations capable of suing and of being sued and both are engaged in business in Memphis, Shelby County, Tennessee. The Defendant, Willie Rudd, is a resident citizen of Memphis, Shelby County, Tennessee. Jurisdiction of this Court is pursuant to 29 U.S.C. 185(a)(b) and pursuant to its pendent jurisdiction.

Count I

1. The Defendant, Willie Rudd, is the President of the "Local" and a Vice-President of the "International" and is the representative of the "International" for Memphis, Shelby County, Tennessee. At all times pertinent hereto, the Defendant, Willie Rudd, was acting as agent of both the "International" and the "Local."

2. On September 6, 1977, the Plaintiff entered into a labor Agreement with the Defendants, "International" and "Local" by which such items as the rates of pay, wages, hours of work and other conditions of employment for employees represented by the Defendants were set forth. Article X, Section 4 of that Agreement sets forth as follows:

> "The employer shall provide the Union with a bulletin board in the plant which the Union and its members shall have the right to use for the purpose of giving notice of Union activities, such as meetings, special events and other similar matters. The Union agrees that it will not publish or circulate any false or misleading remarks about the Employer, its products, its officers, and other personnel."

3. The Plaintiff did, in fact, provide the Union with the bulletin board in the plant pursuant to Article X, Section 4 of the Agreement. However, on August 2, 1978, the Defendant, Willie Rudd, acting as Agent of the "International" and "Local" posted on the bulletin board a "Special Bulletin" which stated in part as follows: "Based upon our interpretation of the contract, we believe this Company has *cheated* the employees out of *thousands of dollars* on overtime pay." A copy of said "Special Bulletin" is attached hereto and incorporated herein as Exhibit "A" to this Complaint.

4. The statement that the Company has cheated the employees out of thousands of dollars on overtime pay is false and misleading and was known by the Defendants to be false and misleading at the time the "Special Bulletin" was posted.

5. As a result of said false and misleading statement about the Plaintiff being posted on the bulletin board, the employee members of the "International" and "Local" walked off their jobs thereby causing the Plaintiff substantial monetary damages. As a result of its breach of contract, the Defendants are liable to the Plaintiff.

WHEREFORE, the Plaintiff sues the Defendants, "International" and "Local", for breach of contract in the amount of Thirty Thousand Dollars ($30,000.00) plus costs, attorney fees, and for any and all other relief for which the Plaintiff may be entitled in this cause.

Count II

6. The Plaintiff hereby incorporates Paragraphs 1 through Paragraph 4 of Count I of this Complaint as if set out herein verbatim.

7. The Defendants' statement that the Plaintiff has cheated the employees out of thousands of dollars on overtime pay is a publication which is libelous per se for which the Plaintiff is entitled to damages.

8. The Defendants' statement that the company has cheated the employees out of thousands of dollars on overtime pay was a publication which was willful and malicious and which was known by the Defendants to be untrue at the time of the statement and that the Plaintiff is entitled to recover special damages against your Defendants.

9. The Defendants' statement that the company has cheated the employees out of thousands of dollars on overtime pay was a publication which was willful and malicious and which was known by the Defendants to be untrue at the time of the statement and that the Plaintiff is entitled to recover punitive damages against your Defendants.

WHEREFORE, the Plaintiff sues the Defendants, United Furniture Workers of America, AFL-CIO; Local NO. 282, United Furniture Workers of America, AFL-CIO and Willie Rudd, for damages and for special damages in the amount of Thirty Thousand Dollars ($30,000.00), and for punitive damages in the amount of One Hundred Thousand Dollars ($100,000.00) plus costs and attorneys fees in this cause.

LAUGHLIN, HALLE, REGAN,
CLARK & GIBSON

By Allan B. Thorp
Attorney for Plaintiff
2201 First Tennessee Bank Bldg.
Memphis, Tennessee 38103

EXHIBIT A

SPECIAL BULLETIN

TO: All Davis Company Employees
FROM: Willie Rudd, President UFWA Local 282

There will be a very important and *urgent* meeting tonight, August 2, 1978, 7:30 p.m. at 2881 Lamar Avenue to discuss problems at your plant, *particular* your *overtime pay.*

Based upon our interpretation of the contract, we believe this Company has *cheated* the employees out of *thousands of dollars* on overtime pay.

It is important that each employee be present for this meeting. We will discuss and decide what course of action we will take to solve this problem.

8/2/78

APPENDIX "C"

First Amendment To The United States Constitution

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. §158

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.